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NO. 05-5224

IN THE SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

OCT - 4 2005

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QUESTION PRESENTED

Whether the recorded telephone call of a domestic violence victim to a 911 call-receiving center immediately after the victim had been assaulted is a "testimonial" statement pursuant to Crawford v. Washington, 541 U.S. 36 (2004).

OPINIONS BELOW

The opinion of the Washington Supreme Court is attached to Davis' petition for writ of certiorari. Pet. App. at 1-11. The opinion of the Washington Court of Appeals is also attached to Davis' petition. Pet. App. at 12-20.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

For purposes of this response, the facts of the case are adequately set forth in the opinions of the Washington Supreme Court and the Washington Court of Appeals. See Pet. App. at 3 and 14.

REASON THE PETITION SHOULD BE DENIED

The State does not dispute that there is some disagreement among State and Federal appellate courts over the proper interpretation of Crawford v. Washington. But the State does dispute the claim that this case is the best vehicle to further develop the constitutional analysis announced in Crawford.

The need for some additional measure of guidance does not mandate granting review in the first few cases to appear on this Court's docket, simply in an effort to say more now than was said in Crawford. Instead, the State respectfully asks this Court to deny the petition for certiorari in this case, and others like it, and await a case wherein the trial court record was *fully* developed after Crawford was decided. In such a case, the trial lawyers will have marshaled their facts and framed their arguments in light of Crawford, and the trial court will have issued its ruling with the new confrontation clause analysis in mind. Such a case will likely be presented in the near future, as the Crawford decision was released nearly nineteen months ago.

If this Court were to grant review in this case, however, such review should be conducted based on the record available to the trial court, not on appendices supplied by Davis, and any factual review should be done with due deference to the trial court's factual determinations.

Certiorari is selectively granted only for compelling reasons, "and rarely when the asserted error consists of erroneous factual findings..." Sup. Ct. R. 10. This Court, as a court of law and not a court for the correction of error, should not review a lower court's findings of fact in the absence of a very obvious and exceptional showing of error. Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949). Appellate courts are ill-equipped to make factual determinations. See Maryland v. Louisiana, 451 U.S. 725, 761-62 (1981) (Rehnquist, J., dissenting) (noting that this Court's original jurisdiction should be sparingly invoked because such jurisdiction often places the Court in the awkward role of fact finder); Anderson v.

Bessemer City, 470 U.S. 564, 574-75 (1985) (reversing federal appellate court's application of "clearly erroneous" standard as to factual findings of district court). And the appellate court's role as fact finder is even more awkward when the legal framework changed after the trial court's factual record was developed.

Although the Davis case arguably presents legal issues arising after Crawford, resolution of those legal issues is intertwined with factual issues never developed below. More importantly, Davis' request for relief would require this court to make factual determinations inconsistent with those made by the trial court. For instance, Davis offered no evidence at the trial court, in the intermediate appellate court, or in the Washington Supreme Court, to show that 911 operators interrogate people who call for assistance. In fact, Davis likely assumed, as would most people, that 911 calls are not interrogations, even under the broadest or most colloquial definition of that term.

Yet, in the Washington State Supreme Court, amicus Washington Association of Criminal Defense Lawyers (WACDL) attempted to supplement the record with selected documents from the 911 call center's internal operations manual.[1] WACDL argued, and Davis now argues in his petition for a writ of certiorari, that because those documents used the term "police incident interview" in association with 911 calls, conversations between caller and

[1] The State objected to reliance on these excerpts because they had never been a part of the record before the trial court, and because the State disagreed with the manner in which certain quotations were characterized. In the alternative, however, the State asked the Washington Supreme Court to consider additional excerpts showing that representations drawn from Davis' excerpts were incorrect. The Washington Supreme Court never expressly ruled on whether the materials should be considered, but the court's opinion did not rely on such materials. Pet. App. at 1-8. The dissent, by contrast, cited to the extra-record material to draw an inference adverse to the State's position. Pet. App. at 9 n.5.

operator are similar to interrogations, thus making statements to 911 operators akin to statements obtained under "police interrogation." Pet. at 19. These "facts" fill nearly the entire first page of Davis' statement of the case, and Davis invites this Court to draw inferences from such "facts" even though they were never adduced at trial. Pet. at 2, 19.

Had this trial occurred post-Crawford, however, these issues could have been litigated, and the trial court could have made informed factual findings on the nature and purpose of the 911 operator's duties. But since this essentially factual argument was raised for the first time on appeal, by an amicus, the record simply cannot support it.[2] Thus, either this Court must defer to the factual rulings of the trial court, which do not include any finding that 911 operators are conducting interrogations, or this Court must make its own factual findings in this regard, based upon nothing but an appendix to a petition or brief. This is fundamentally inconsistent with the role of an appellate court, much less this Court's jurisprudence in granting certiorari.

Similarly, under many interpretations of Crawford, the declarant's state of mind plays *some* role in determining whether a statement is testimonial.[3] As to

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[2] The record is also silent as to the precise employment status of 911 operators, specifically whether they are police officers or detectives. Such a claim seems implausible, and Davis appears not to make that claim.

[3] Whether the inquiry is subjective or objective is debated. While Davis advocates an "objective" test, it is not clear from his pleadings whether he supports an "objective" test that acknowledges the caller's dire situation (i.e., the reasonable person in the caller's shoes), or an "objective" test drawn from a detached, academic perspective, entirely divorced from the caller's actual circumstances (i.e., a theoretical reasonable caller who "realizes" in some abstract sense, that her statement could be used in court). Moreover, it has been argued that the import of this subjective / objective distinction is slight, in that either test will yield similar results; but it has also been argued that the distinction is significant, with "enormous practical implications." Compare Richard Friedman & Bridget McCormack, Dial In Testimony, 150 U. Pa. L. Rev. 1171, 1240 (arguing that either test would "yield[ ] similar results") with Hammon v. Indiana, Docket No. 05-

Ms. McCottry's state of mind, the trial court necessarily found that she called 911 immediately after a startling event, while under the influence of that event, without an opportunity to fabricate, and without reflection. That conclusion was based on the trial court's listening to the 911 tape, in which the tone, volume, and inflection of Ms. McCottry's voice can be assessed.[4] The trial court's findings were also influenced by the testimony of the two responding police officers, who found Ms. McCottry panicked, in the company of her small children, rushing around the house trying to gather her belongings to flee the residence, with what appeared to be fresh damage to a wall, and with a ripening bruise on Ms. McCottry's face. Pet. App. at 3.

The Washington Supreme Court also listened to the 911 tape and reviewed the record. It, too, concluded that Ms. McCottry's call was a cry for police intervention rather than an attempt to create evidence.[5] Pet. App. at 6-7. Both courts were likely also influenced by the fact that Ms. McCottry did not wish to assist the responding police officers, and that she refused to sign a statement

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5705, Petitioner's Reply Brief in Support of Petition for Writ of Certiorari at 3 (arguing that "The difference...has enormous practical implications."). If a factual finding on the caller's state of mind bears such legal significance, the trial court's assessment of the evidence is surely entitled to great weight.

[4] The 911 call was played at oral argument before the Washington Supreme Court and may be heard at the archived arguments section of the website. *See* Washington Supreme Court oral argument (Sept. 19, 2004), *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. The tape-recording of the 911 call is played at 52:40. The archived argument should be accessed through Real Player, as the recorded 911 call is inaudible using Microsoft Windows Media Player

[5] Amici Washington Public Defenders and National Association of Criminal Defense Attorneys unfairly characterize the Washington Supreme Court's decision as based on mere guesswork. Br. of Amici at 3, 9 (claiming that the court simply "surmised" that Ms. McCottry's call was a cry for help, and later characterizing the conclusion as "supposition" as to her state of mind). The court's decision was not simply guesswork, but rather was based on reasonable conclusions from the evidence.

for their report, and even attempted to shield her face when they tried to photograph her injuries. Pet. App. at 14. The conclusions of the trial court and the Washington Supreme Court are simply inconsistent with the finding Davis now asks this Court to make -- that Ms. McCottry intended, or knew in some meaningful sense, that her 911 call would be used months hence as evidence in a court of law to prove some fact.

Moreover, while testimony bearing on these questions might have been elicited post-Crawford, none was elicited here. For instance, the State might have elicited testimony in a pretrial hearing from the responding officers regarding the number of times each has encountered victims or witnesses who seem completely oblivious to the fact that their 911 call was recorded and could be used in court absent their testimony. Such testimony might even have been available from the responding police officers in this case vis-à-vis Ms. McCottry's apparent state of mind or awareness of subsequent legal proceedings. The State could also have elicited testimony from domestic violence advocates as to whether, in their experience, domestic violence victims understand how and when ex parte statements may be used under the hearsay rules or under the Confrontation Clause.

Conversely, defense counsel might have been able to show, through evidence of past cases, and/or past participation in the legal system, that Ms. McCottry *actually* understood that a call to police would initiate a police response, a prosecution, and a conviction based on her ex parte statements. Had a record been developed post-Crawford, such matters could have been explored, and the

trial court would have had the facts necessary to rule. But this Court should be wary of making such factual findings based on very general assertions about a body of knowledge that is alleged to exist in the populace concerning the detailed workings of the rules of evidence, and about constitutional criminal procedure. See Pet. App. at 24-25.

CONCLUSION

Lower courts will be best served by granting review in a case with a fully developed factual record decided post-Crawford. A case tried before Crawford is a weaker vehicle for clarifying Crawford because such a case necessitates an appellate court to make both factual and legal determinations on a factual record that was not developed with the appropriate analysis in mind. For these reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari. If certiorari is granted, the State respectfully asks that review be limited to the record developed at trial, and that deference be given to the trial court's factual determinations.

DATED this 29th day of September, 2005

RESPECTFULLY submitted,

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CERTIFICATE OF SERVICE

I, James M. Whisman, a member of the bar of this Court, hereby certify that on this 29th day of September, 2005, I caused to be mailed first class postage prepaid, a copy of the Respondent's Brief in Opposition in the above-entitled case, to Ms. Nancy Collins, counsel for Petitioner Adrian Martell Davis, the respondent herein, at the Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington, 98101. I also served a copy of the same document on Mr. Jeffrey L. Fisher, counsel for Petitioner, at Davis, Wright, Tremaine LLP, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101-1688.

I further certify that all parties to be served have been served.

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